84-622

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EDDIE STEAMSHIP COMPANY LTD.,

Petitioner,

—against—

P.T. KARANA LINE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Does a district court of the United States, exercising admiralty and maritime jurisdiction pursuant to 28 U.S.C. §1333, lack the power to issue an injunction under circumstances in which a district court of the United States exercising non-admiralty jurisdiction would be empowered to do so?

2. After the decisions of the United States Supreme Court in *Swift* v. *Compania Colombiana Del Caribe S.A.*, 339 U.S. 684 (1950) and *Vaughan* v. *Atkinson*, 369 U.S. 527 (1962), and the 1966 recision of the former Rules of Practice in Admiralty and Maritime Cases and the adoption of the unifying amendments to the Federal Rules of Civil Procedure in 1966, may a United States Court of Appeals vacate an injunction issued by a District Court exercising admiralty and maritime jurisdiction on the grounds that the power to issue the injunction was nonexistent, rather than abused, and, in the absence of Constitutional or legislative authority, decide when and under what circumstances it will recognize the existence of the equitable power of the district courts of the United States exercising admiralty and maritime jurisdiction pursuant to Title 28 U.S.C. §1333?

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the District Court for the Southern District of New York is not yet reported. The opinion of the Court of Appeals for the Second Circuit is reported at 739 F.2d 37. The opinion of the Court of Appeals for the Second Circuit denying the petition for rehearing is not yet reported. A copy of the text of each of the above opinions is appended to this petition in the Appendix.

The judgment of the Court of Appeals for the Second Circuit was entered on 29 June 1984 and a copy thereof is appended to this petition in the Appendix. The petition for rehearing was filed on 12 July 1984. The petition for rehearing was denied on 14 August 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Statutes, Federal Rules, and Regulations Involved

UNITED STATES CONSTITUTION, ARTICLE III SECTION 1

"The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . ."

UNITED STATES CONSTITUTION, ARTICLE III SECTION 2

"The Judicial Power shall extend to all Cases, in Law and Equity . . . [and] . . . to all Cases of admiralty and maritime Jurisdiction . . ."

TITLE 28 U.S.C. §1333

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty of maritime jurisdiction . . ."

FEDERAL RULES OF CIVIL PROCEDURE

"Rule 1. Scope of Rules

"These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exception stated in Rule 81.

"They shall be constructed to secure the just, speedy, and inexpensive determination of every action."

"Rule 2. One Form of Action

There shall be one form of action to be known as 'Civil Action'."

Supplemental Rules For Certain Admiralty And Maritime Claims

"Rule E (6) Reduction or Impairment of Security

Whenever security is taken the court may, on motion and hearing, for good cause shown, reduce the amount of security given; and if the surety shall be or become insufficient, new or additional sureties may be required on motion and hearing."

Statement

This suit involves the power of a district court of the United States exercising admiralty and maritime jurisdiction pursuant to 28 U.S.C. §1333.

The basic facts, which are not in dispute, are as follows:

In 1980 the parties entered into a maritime contract which provided for arbitration of disputes in New York. Disputes arose between the parties and arbitration proceedings were commenced in New York in September 1981 pursuant to a submis-

sion agreement which provided that the award may be made a judgment of the United States District Court for the Southern District of New York.

In December 1981, the respondent invoked the admiralty jurisdiction of the United States District Court for the District of Louisiana and obtained a pre-judgment attachment of the petitioner's vessel M/V Panamax World pursuant to Rule B of the Supplemental Rules For Certain Admiralty and Maritime Claims, (hereinafter, "the supplemental rules"). Pursuant to Rule E of the supplemental rules the parties proceeded to a hearing to determine the amount of security necessary to release the vessel. After hearing the parties, United States District Court Judge Patrick E. Carr fixed the amount of security to which respondent was entitled under Rule E at U.S. $3,150,000.00. Security in that amount in the form of an irrevocable letter of credit drawn on a New York bank in all matters acceptable to the respondent was issued and the vessel released. Respondent then voluntarily discontinued its action without prejudice.

Similar actions for Rule B attachments in the United States District Court for the Southern District of New York and in the District of Ohio were similarly discontinued without prejudice.

There is no evidence that the current security is or will become impaired.

On or about 10 May 1984, respondent, alleging admiralty and maritime jurisdiction, caused a writ of maritime attachment to be issued by the Supreme Court of South Africa and served upon the petitioner's vessel M/V Steel Transporter at the port of Richards Bay, South Africa commanding the vessel to remain under attachment pending the posting of security in the amount of U.S.$2,200,000.00. Respondent claims this additional pre-judgment security is necessary, *inter alia*, to secure a future claim respondent may have for indemnity arising out of a cargo claim

against respondent in a United States District Court in Louisiana in an estimated amount of U.S.$950,000.00, plus three (3) years anticipated interest on that claim in the amount of U.S.$285,000.00, plus attorneys fees of U.S.$60,000.00. The cargo claim arose out of the same incidents in 1981 which gave rise to the dispute currently being arbitrated between the parties in New York. Respondent also seeks additional security which it alleges the United States District Court in Louisiana mistakenly failed to allow in 1981 in the approximate amount of U.S.$600,000.00 as well as to correct the respondent's earlier under estimate of its contributions in general average of approximately U.S.$275,000.00.

On 14 May 1984 petitioner commenced a civil action by filing a complaint in the United States District Court for the Southern District of New York, seeking money damages and injunctive relief to effect the release of the attachment. That same day petitioner moved on order to show cause for an order requiring respondent to release its attachment.

After oral argument on 18 May 1984 and 1 June 1984, United States District Court Judge Richard J. Owen granted the injunction in a Memorandum and Order dated 7 June 1984 and retained jurisdiction to entertain applications for alternative relief if respondent did not comply forthwith with the District Court's order. No transcript of either hearing was made.

On 15 June 1984, respondent filed a Notice of Appeal from Judge Owen's order and a Notice of Motion seeking a stay of Judge Owen's order pending appeal.

On 19 June 1984, the Court of Appeals for the Second Circuit granted the stay and ordered an expedited appeal.

On 29 June 1984 the Court of Appeals for the Second Circuit entered judgment vacating the injunction upon the grounds that the District Court lacked the power to issue the injunction

and remanded the case to the district court for further consideration.

On 2 July 1984 the vessel was sold at public auction in Durban, South Africa. Respondent now maintains its attachment on the proceeds of the sale of the vessel.

On 12 July 1984 Petitioner filed a Petition for Rehearing with a Suggestion for a Rehearing in banc.

On 14 August 1984 the Court of Appeals for the Second Circuit entered judgment denying the Petition for Rehearing.

Existence of Jurisdiction Below

The District Court for the Southern District of New York had jurisdiction pursuant to 28 U.S.C. §1333.

REASONS FOR GRANTING THE WRIT

The decision of the Second Circuit should be reviewed because it establishes a limitation on the power of a district court of the United States inconsistent with the United States Constitution, Title 28 U.S.C. §1333, the decisions of this Court, the Federal Rules of Civil Procedure and creates a direct conflict between the Second Circuit on the one hand and the First Circuit and the Fifth Circuit on the other.

POINT I

The law of the land is that admiralty courts are empowered to issue the equitable remedy of an injunction.

Article III, Section 1 of the United States Constitution provides, in pertinent part, that, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior

Courts as the Congress may from time to time ordain and establish". Section I of the same Article provides, in pertinent part, that "The judicial Power shall extend . . . to all Cases of admiralty and maritime jurisdiction . . .". Pursuant to Article III, Section I, Congress established the district courts of the United States and vested the district courts with, ". . . original jurisdiction, exclusive of the courts of the states, of: (1) Any civil case of admiralty or maritime jurisdiction . . ." 28 U.S.C. §1333.

There is no limitation in Article III of the United States Constitution or in the enabling legislation of Title 28 U.S.C. §1333 which prohibits the district courts of the United States, exercising admiralty and maritime jurisdiction, from granting injunctive relief in the same manner as that relief may be granted by a district court of the United States exercising non-admiralty jurisdiction.

In 1962, in *Vaughn* v. *Atkinson*, 369 U.S. 527 (1962), this Court held, "Equity is no stranger in admiralty, *admiralty Courts are, indeed, empowered to grant equitable relief*". (emphasis added). In doing so, this court referred to the 1950 decision of this Court in *Swift & Co.* v. *Compania Colombiana Del Caribe, S.A.* 339 U.S. 684 (1950), in which this court held,

> "We find no restriction upon admiralty by chancery so unrelenting as to bar the grant of any equitable relief even when that relief is subsidiary to issues wholly within admiralty jurisdiction. Certainly there is no ground for believing that this restriction was accepted as a matter of course by the framers of the Constitution so that such sterilization of admiralty jurisdiction can be said to have been presupposed by Article 3 of the Constitution." *Swift, supra,* at 691-692.

Four years after *Vaughn, supra,* in 1966, this Court transmitted to Congress the 1966 amendments to the Federal Rules of Civil Procedure which rescinded the former Rules of Practice in Admiralty and Maritime Cases, abolished the distinctions be-

tween actions at law and suits in admiralty, and established one form of action to be governed by one set of rules. *see* F.R.C.P.1, F.R.C.P.2. Therefore, it is the law of the land that the district courts of the United States, exercising admiralty and maritime jurisdiction pursuant to Title 28 U.S.C. §1333, are empowered to issue the equitable remedy of an injunction. *see, Pino* v. *Protection Maritime Insurance Co.*, 599 F.2d 10 (1st Cir.), *cert. denied*, 444 U.S. 900 (1979); *Lewis* v. *S.S. Baune*, 534 F.2d 1115 (5th Cir. 1976). Petitioner, as a litigant in a United States Court, was entitled to the full panoply of remedies available to that Court. The Second Circuit was not at liberty to determine when and under what circumstances it will recognize the existence of the power of a district court of the United States to issue an injunction. That power may only be and has been established by Congress pursuant to Article III of the United States Constitution and exists independently from the circumstances surrounding its exercise. If the power to issue the injunction exists the Second Circuit must recognize it. It follows that if a district court of the United States decides that the circumstances require the exercise of its equitable power and the issuance of an injunction the appellate court is bound to recognize that power and affirm the issuance of the injunction unless the appellate court finds that the district court abused its discretion. In this case the Second Circuit did not reach the issue of whether or not the exercise of the equitable power of the District Court was abusive but instead held that the power to issue an injunction was *non-existent* in a district court of the United States exercising admiralty and maritime jurisdiction.

This holding is directly in conflict with the respective holdings of the Court of Appeals for the First Circuit, *see Pino, supra,* and the Court of Appeals for the Fifth Circuit, *see, Lewis, supra.*

The decision of the Second Circuit thus establishes a conflict between the Circuits and places a limitation upon the equitable power of the district court of the United States which power has been authorized by Congress and recognized by the United States

Supreme Court. Therefore, the decision should be reviewed and reversed in order to harmonize the law of the Second Circuit with that established by Congress in 28 U.S.C. §1333 and that recognized by this Court in *Swift, supra,* and *Vaughn, supra.*

POINT II

The factors considered by the Second Circuit are not impediments to the Court's resolution of a dispute which is ripe for resolution.

The Second Circuit referred to the following factors in holding that the case was an inappropriate one to recognize the power of a district court of the United States, sitting in admiralty, to issue injunctive relief:

1. *Both petitioner and respondent are foreign companies.*

This reason, if affirmed, would result in a catch-22 which may prevent the issue from ever being decided. If either party was a United States corporation, diversity jurisdiction would exist, (28 U.S.C. §1332 (a) (2)), and the Court would not be presented with the issue of whether or not a district court of the United States exercising exclusively admiralty and maritime jurisdiction has the power to issue an injunction.

2. *The attached vessel was in South Africa.*

Because Rule E (6) of the supplemental rules prohibits a party from seeking additional pre-judgment security in the United States unless the original security becomes impaired and, even then, only upon motion and hearing, it is extremely unlikely that the controversy presented here will ever arise unless the attached property is outside of the United States. Thus, a party will only need to resort to the Courts of the United States when property

outside of the United States is attached. Therefore, rather than an impediment it is almost a *sine que non* of this issue that the attached property be outside of the United States. More importantly, if the attachment was unlawful for the reasons stated by the district court and discussed in point 3 hereof, *infra,* the situs of the wrongfully attached property becomes irrelevant.

3. *The original order of security was issued by a district court of the United States in Louisiana—United States Law may be inapplicable—a serious question exists concerning in personam jurisdiction over respondent.*

It is the existence of the original order of security, not its source, which is relevant to this dispute. The order of security issued by the district court of the United States in Louisiana was predicated upon the supplemental rules. As noted above, Rule E (6) of the supplemental rules provides that an attachment of additional security must be preceded by, first, an impairment of the original security and, even then, only on motion and hearing. There is no reason for the owner of the attached property to put up security to release it if, after its release, additional property may then be attached. Otherwise, taken to its logical conclusion, the vessel released by the posting of security could then be reattached in its next foreign port-of-call. Rule E (6) was designed to prevent such an inequity. By invoking the supplemental rules in seeking the original order of security respondent should not be allowed to pick and chose those sections of the supplemental rules with which it will comply and those which it will ignore. Petitioner here had an expectation that by complying with the Louisiana District Court's order it would not be subject to further prejudgment attachment and that the United State's Courts would enforce that order and protect the reasonable expectations which petitioner had as a result of complying with that order. Thus, United States Law must apply to prevent the respondent from collaterally attacking the basis of the original order of security in foreign jurisdictions throughout the world.

Since respondent invoked the jurisdiction of the United States District Court to rule upon the security to which respondent was entitled, and petitioner has provided that security, petitioner is entitled to prevent respondent from collaterally attacking that order or circumventing the supplemental rules upon which it was based in any district court which has jurisdiction over respondent. This jurisdiction exists here by virtue of respondent's participation in the arbitration within the Southern District of New York and the fact that this attachment arose out of that participation. *Merrill Lynch* v. *Lecopulos* 553 F. 2d 842 (2d Cir. 1977); *Victory Transport Inc.* v. *Comisaria General,* 336 F. 2d 354 (2d Cir.), *cert. denied,* 381 U.S. 934 (1965).*

4. *South Africa may be a better forum to decide this dispute.*

Petitioner has claimed, and the district court has found, that the respondent is bound by the original order of security and therefore, the respondent may not ignore the original order and seek to attach additional property of petitioner throughout the world.

Thus, even if the South Africa court decides in petitioner's favor the South Africa decision would not prevent respondent from attaching petitioner's property in other jurisdictions. Only the injunctive relief issued by the district court enforcing the original order of security would serve to prevent respondent from further attachments of petitioner's property in other jurisdictions.

* * * *

Summary of Point II

Having decided that the district court lacked the power to issue the injunction the Second Circuit expressed no opinion on any of the above items except to hold that their cumulative effect

*Since the Second Circuit has not ruled on the issue of *in personam* jurisdiction, however, this issue is not before the Court.

was to render this an inappropriate case to recognize the power of a district court sitting in admiralty from issuing injunctive relief.

It is respectfully submitted that even if the Second Circuit was entitled to consider any of the above circumstances in deciding whether or not to recognize the power of the District Courts of the United States to issue injunctive relief the Second Circuit has abused its discretion in that not one of the above factors provides a sufficient impediment to the Second Circuit's deciding the issues raised on appeal. By not deciding the issues, and more or less dismissing the appeal, the Second Circuit has vacated an injunction which the District Court found to be required by the circumstances of the case. Unlike a case where the District Court finds an injunction unecessary and the appellate court affirms, the decision of the Second Circuit in this case has prejudiced petitioner by vacating a remedy the District Court found necessary.

Therefore, assuming, *arguendo,* that the Second Circuit had discretion to recognize the existence of the equitable power of the District Court the Second Circuit has abused its discretion in not recognizing that power in a case where the District Court found the injunction necessary.

Conclusion

For the reasons stated above the decision of the Second Circuit should be reversed; the power of a district court of the United States exercising admiralty and maritime jurisdiction to issue injunctive relief recognized; and the case remanded with instructions that the injunction be reinstated to order respondent to release its attachment on the proceeds of the sale of the vessel and for such other and further review or instructions as to this Court may be just and proper.

Respectfully submitted,

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Of Counsel

Order of the Court of Appeals and Majority Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1611 August Term, 1983
(Argued: June 28, 1984 Decided: June 20, 1984)
Docket No. 84-7523

EDDIE STEAMSHIP COMPANY LTD.,

Plaintiff-Appellee,

—against—

P.T. KARANA LINE,

Defendant-Appellant.

Before: KEARSE, PIERCE, and SWYGERT,* *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Richard Owen, *Judge*, enjoining defendant to release an attachment of a vessel in South Africa.

Vacated and remanded.

Judge Swygert dissents in an opinion to be filed in due course.

WILLIAM P. BYRNE, New York, New York (Byron King Callan, Cichanowicz & Callan, New York, New York, on the brief), *for Plaintiff-Appellee.*

*Honorable Luther M. Swygert, Sr., Senior Judge of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

HOWARD S. MILLER, New York, New York (Brian D. Starer, Haight, Gardner, Poor & Havens, New York, New York, on the brief) *for Defendant-Appellant.*

PER CURIAM:

Defendant-appellant P.T. Karana Line ("Karana") appeals from an order of the United States District Court for the Southern District of New York, Richard Owen, *Judge,* ordering it to cause the release of its attachment of the STEEL TRANSPORTER, a ship owned by plaintiff Eddie Steamship Company Ltd. ("Eddie") and located in Richards Bay, South Africa. On appeal, Karana contends, *inter alia,* that the district court lacked subject matter jurisdiction over the action, lacked personal jurisdiction over Karana, lacked the power to issue an injunctive order, applied the wrong body of substantive law, and abused its discretion in entering the order. Because we are not persuaded that the court had the power to grant the requested injunction, we vacate the order and remand to the district court.

Background

Briefly summarized, the controversy has its origins in a fire that caused millions of dollars of damage to a ship owned by Karana, an Indonesian shipowner, and chartered to Eddie, a Chinese business entity, in 1981. As a result, Karana brought arbitration proceedings in New York against Eddie. In connection with the arbitration proceedings, in 1981 Karana attached certain assets belonging to Eddie as security for its claims in arbitration. Eventually, those attachments were vacated after Eddie was required by a federal court in Louisiana to post a bond in the amount of $3,150,000.

The arbitration proceedings have gone forward and have recently resulted in a partial final award of the arbitrators, ruling that Eddie is liable for the damages resulting from the fire; the

amount of those damages remains to be determined. Karana claims that events and claims filed against it since the 1981 posting of security reveal that its losses from the fire will total nearly $5,000,000; and it asserts that various actions by creditors of Eddie have revealed Eddie to be in precarious financial condition. Accordingly, Karana caused the Supreme Court of South Africa to issue an order of attachment on the STEEL TRANSPORTER located in Richards Bay, South Africa, in order to obtain additional security for its losses.

Eddie commenced the present action, alleging that the attachment of the STEEL TRANSPORTER was wrongful and in violation of the 1981 order of the Louisiana federal court. Invoking the court's admiralty jurisdiction, Eddie requested principally an injunction requiring Karana to cause the attachment to be released. The district court, ruling that the new attachment conflicted with the purpose of the arbitration statute[1] and that Karana had not proven that special circumstances justified a new attachment, entered the injunction requested by Eddie.

Karana unsuccessfully moved in the district court for a stay pending appeal, and then sought such relief in this Court. In support of its motion here, Karana has stated in an affidavit that other creditors of Eddie have now attached the STEEL TRANSPORTER and have scheduled a judicial sale of the vessel for July 2, 1984. This Court granted a stay of the district court's order and expedited the appeal.

For the reasons below, we conclude that the district court lacked the power to enter the requested injunction, and we reverse and remand for such further proceedings as may be appropriate.

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[1]The court's reference was to the Federal Arbitration Act, 9 U.S.C. §1 *et seq.* (1982), which had been invoked in the earlier litigation over Karana's prior attachment of Eddie's assets. Eddie's complaint in the present action did not mention the arbitration statute and did not suggest that Karana was not proceeding with the arbitration.

Discussion

The traditional view is that a court of admiralty has no power to issue injunctions. *See, e.g., The Eclipse,* 135 U.S. 599 (1890). That principle was modified in *Schoenamsgruber* v. *Hamburg American Line,* 294 U.S. 454 (1935), in which the lower court had stayed trial of the action pending arbitration, and the petitioner claimed that the stay was appealable as an interlocutory injunction. The Supreme Court dismissed the appeal, ruling that "[w]hile courts of admiralty have capacity to apply equitable principles in order the better to attain justice, they do not have general equitable jurisdiction and, except in limitation of liability proceedings, they do not issue injunctions." *Id.* at 457-58 (footnotes omitted). *See also Swift & Co. Packers* v. *Compania Colombiana Del Caribe,* 339 U.S. 684 (1950) (court of admiralty has jurisdiction to determine an equitable issue—the defense of fraudulent transfer of a vessel—when the case was otherwise maritime in nature).

This Court has concluded that although the proscription against equitable relief stated in *The Eclipse* has been eroded by subsequent cases, "the power of an admiralty court to grant injunctive relief remains severely circumscribed. *See* Moran Towing & Transportation v. United States, 290 F.2d 660, 662 (2d Cir. 1961)." *New York State Waterways Association, Inc.* v. *Diamond,* 469 F.2d 419, 421 n.2 (2d Cir. 1972). The view that the equity powers of an admiralty court remain severely circumscribed was followed most recently in *Tradax Limited* v. *M.V. Holendrecht,* 550 F.2d 1337 (2d Cir. 1977).

Much of the reason for the original rule has vanished, *see, e.g.,* G. Gilmore & C. Black, *The Law of Admiralty* §1-14 (2d ed. 1975); Note, *Admiralty Practice After Unification: Barnacles on the Procedural Hull,* 81 Yale L.J. 1154, 1157-63 (1972), and some of our sister Circuits have held that in proper cases admiralty courts may issue injunctions, *see Pino* v. *Protection Maritime Insurance Co.,* 599 F.2d 10 (1st Cir.), *cert. denied,*

444 U.S. 900 (1979); *Lewis* v. *S.S. Baune*, 534 F.2d 1115 (5th Cir. 1976). Indeed, we may well join those circuits when we are confronted with an appropriate case. Given the record in the present case, however, we see no persuasive reason here to depart from the traditional principle. Although Eddie urges on appeal that the injunction is sought in aid of the arbitration in New York, the arbitration has proceeded apace and there is no indication that Karana seeks to avoid it. Indeed, Karana has received a favorable decision as to liability that makes Eddie liable for all damages resulting from the fire. Given that the attachment of the vessel seems to have no impact on the New York arbitration proceedings, the connection of the New York federal court with this controversy is quite tenuous. Both Eddie and Karana are foreign companies; the ship attached is in South Africa; and the order originally granting Karana security was issued by a Louisiana federal court. It is hardly clear that United States law, applied below, should be applied; and the issues may be litigated in the South African court, which apparently has jurisdiction of the parties and the vessel. Further, Karana raises a serious question as to whether the court in New York has in personam jurisdiction over it.

The district court addressed these issues only conclusorily, and we are faced with a record that, if adequately developed, might well reveal merit in one or more of Karana's other arguments for reversal of the district court's order. In all the circumstances, this does not seem to us an appropriate case for the Court to change the law of the Circuit as to the injunctive powers of the district court sitting in admiralty.

Accordingly, we vacate the order of the district court enjoining Karana to release its attachment of the STEEL TRANSPORTER.

Although Karana urges that we also order the action dismissed, we note that Eddie's complaint included a request for damages of $11,000 per day during Karana's attachment. The

parties appear to agree that that attachment existed for several days before other creditors attached the vessel. Our decision that the court had no power to grant the requested injunction thus does not resolve all of the issues in the litigation. We express no view at to the merits of the other issues raised on appeal, and we remand for such further proceedings as may be appropriate. Absent the press of an artificial deadline, those issues may be developed properly in the district court.

Conclusion

The order of the district court is vacated and the cause is remanded. Costs to appellant. The mandate shall issue forthwith.

EDDIE STEAMSHIP CO., LTD. v. P. T. KARANA LINE, No. 84-8061

I concur: L. W. Pierce
6/29/84

EDDIE STEAMSHIP CO., LTD. v. P. T. KARANA LINE, No. 84-7523

I dissent, opinion to follow
Luther M. Swygert

Dissenting Opinion of Swygert, U.S.C.J.

No. 84-7523, Eddie Steamship Co. v. P. T. Karana Line

SWYGERT, Senior Circuit Judge, dissenting. The majority asserts that this is an inappropriate case—at least in its present posture—to reexamine the first and fundamental question: Did the district court sitting in admiralty have the power to issue the mandatory injunction directing the Karana Line to release its attachment of the STEEL TRANSPORTER owned by the Eddie Steamship Company?

As predicate of its stance, the majority, after referring to the traditional idea that admiralty courts have no injunctive powers (*The Elipse*, 135 U.S. 599 (1890)), states that this proscription, though eroded by later cases, remains the underlying approach of this court. *See New York State Waterways Ass'n, Inc.* v. *Diamond*, 469 F.2d 419, 421 n.2 (2d Cir. 1972) ("[T]he power of an admiralty court to grant injunctive relief remains severely circumscribed.").

The majority then lists a number of alleged impediments that make this an inappropriate case for a definitive ruling on the jurisdictional question. Those impediments, however, do not speak to the jurisdictional question; rather, they address a different question: whether the district court, given the fact that it had injunctive powers, properly exercised that power in light of the circumstances described by the majority. I believe the majority has misapprehended these circumstances. Rather than waiting for an "appropriate case for the Court to change the law of the Circuit as to the injunctive powers of the district court sitting in admiralty," we should change the law of the circuit now because the question is ripe for resolution.

It is my further belief that the district court is clothed with the power to issue the injunction from which this appeal is taken. As support for that view, I adopt the reasoning of the First Cir-

cuit in *Pino* v. *Protection Maritime Insurance Co.*, 559 F.2d 10 (1st Cir.), *cert. denied*, 444 U.S. 900 (1979), and that of the Fifth Circuit in *Lewis* v. *S.S. Baune*, 534 F.2d 1115 (5th Cir. 1976). (The rationales of the two circuits are substantially identical.)

As to the other issues, I would hold that the district court exercised *in personam* jurisdiction over the defendant, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Lecopulos*, 553 F.2d 842 (2d Cir. 1977), and the district court did not abuse its discretion when it entered the injunctive order under the facts of this case. In my opinion, none of the circumstances alluded to by the majority for consideration on remand stands in the way of the grant of the injunction.

I would affirm.

Order of Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 14th day of August, one thousand nine hundred and eighty-four.

EDDIE STEAMSHIP COMPANY, LTD.,

Plaintiff-Appellee,

against

P.T. KARANA LINE,

Defendant-Appellant.

Docket No. 84-7523

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiff-appellee, Eddie Steamship Company, Ltd.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED, Judge Swygert dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith,
Clerk

Memorandum and Order dated June 7, 1984

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDDIE STEAMSHIP CO.,

Plaintiff,

—against—

P.T. KARANA LINE,

Defendant.

84 Civ. 3359(RO)

OWEN, District Judge

This action is the latest in a series of proceedings brought as a result of a fire in August, 1981 aboard the M/V Kartini, a vessel owned by defendant P.T. Karana Line and, at the time of the fire, chartered to plaintiff Eddie Steamship Company. This fire, perhaps caused by spontaneous combustion, forced the Kartini to spend nearly two months in the port of Long Beach, California, which, defendant asserts, resulted in the loss of millions of dollars. As required by their Charter Party Agreement, Karana brought arbitration proceedings in New York against Eddie Steamship, to recover for these losses, which it alleges were caused by plaintiff's negligence. These arbitration hearings, while still in progress, are, according to defendant's counsel, nearing completion.

In December, 1981, shortly after it instituted arbitration proceedings, defendant filed a complaint in the United States District Court for the Eastern District of Louisiana attaching one of plaintiff's ships, the M/V Panamax World, as security for its claims in arbitration. Defendant also filed a complaint in the Southern District of New York seeking security for the same damages and attaching several of plaintiff's bank accounts. A series of hearings were held by Judge Robert Carr of the Eastern

District of Louisiana to determine the proper amount of the bond needed to secure defendant's claims and, on December 8, 1981, after determining that defendant's request for $3,698,253 was excessive, Judge Carr ordered the posting of $2,891,055 as security. Defendant moved for reconsideration and, after further argument, the bond was raised to $3,150,000. Thereafter, defendant's actions in Louisiana and New York were both voluntarily dismissed without prejudice and the attachments obtained in those actions were discharged.

Now, nearly two and one half years after these events—years in which the arbitration to resolve the dispute between these parties apparently proceeded without substantial difficulty—defendant has attached another of plaintiffs' ships, the Steel Transporter, in Richard Bay, South Africa. Plaintiff brought the instant order to show cause seeking to lift this latest attachment, which defendant acknowledges is based on the same 1981 controversy as Karana's earlier attachment of Eddie Steamship property.

Defendant argues that it is entitled to obtain further security through this much—subsequent attachment because it believes an arbitration award in its favor will significantly exceed the $3,150,000 as to which it is already bonded and because, it suggests, Eddie Steamship is presently experiencing financial difficulties. Karana further asserts that this Court has neither jurisdiction nor power over any attachment of Eddie Steamship property in foreign countries and that it is therefore free to attach ships as often as it likes in any overseas forum whose laws favor its position that more security should be provided. I disagree with both these propositions in this situation.

There is no question that, having availed itself of arbitration procedures pursuant to the Federal Arbitration Act (9 U.S.C. §1 *et seq.*) defendant is entitled to security obtained by libel and seizure of a vessel. Indeed, defendant's complaint in the original attachment proceedings, which resulted in the posting of the $3,150,000 letter of credit, stated that

> This complaint is instituted in accordance with the provisions of 9 U.S.C. Section 8, in order to obtain security and jurisdiction, and no waiver is intended of plaintiff's rights to proceed to arbitration in accordance with the provisions of the hereinafter described charter party dated on or about July 30, 1981, including, but not limited to, Clause 17 thereof, which rights are specifically reserved.

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9 U.S.C. §8 provides an exception to the usual rule that judicial proceedings are to be stayed while claims covered by this statutory scheme are in arbitration. *The Anaconda* v. *American Sugar Refining Co.,* 322 U.S. 42 (1944). The exception is limited, however, and does not give parties free reign to proceed with any and all judicial proceedings relating to attachment while they are in arbitration. *Craig Shipping Co.* v. *Midland Overseas Shipping Corp.,* 259 F. Supp. 929 (S.D.N.Y. 1966). After attaching plaintiff's ship in 1981 and having the proper amount of security determined by the Court in which defendant elected to proceed with that attachment, it must submit to the arbitration which it initiated, just as if such proceedings had been commenced by an order pursuant to U.S.C. §4. *Marine Transit Co.* v. *Dreyfus,* 284 U.S. 263 (1931).

Defendant's assertion that it is free to institute further arbitration proceedings in such form around the world as it finds plaintiff's vessels because, after two and one half years of arbitration, it has unilaterally decided that further security for its claims is required, is in complete conflict with the purpose of the arbitration statute and, by permitting the crippling of a vessel's ability to perform its service, it has a coercive side-effect that can hardly be ignored. Our federal scheme of arbitration is designed to bypass the delay and expense of judicial proceedings and would obviously be undercut if, instead of providing for an initial proceeding to secure a claim, section 8 was interpreted to

allow repeated attachments around the world while arbitrators attempt to settle a dispute. Thus, in *Marine Transit Co.* v. *Dreyfus, supra,* the Supreme Court stated: "By the express terms of §8, the libel and seizure are authorized as an *initial* step in a proceeding to enforce the agreement for arbitration. . . ." 284 U.S. at 275, (emphasis added). Repeated attachments are not favored once security has been obtained and a dispute is submitted to arbitration. *Compania De Navegacion Y Financiera Bosnia, S.S.* v. *National Unity Marine Salvage Corp.,* 457 F.Supp. 1013 (S.D.N.Y. 1978).

Finally, I observe that even if, in exceptional circumstances, an additional foreign attachment after a dispute is in arbitration might be appropriate, defendant has presented to competent evidence that such circumstances exist in this case. Defendant's argument is supported only by the affidavit of one of their attorneys asserting that Judge Carr underestimated the potential damage award. The affiant also states that "a reliable source" has informed him that Eddie Steamship has been having certain financial troubles but, at oral argument, it was conceded that plaintiff's banks may have "bailed it out" of these financial difficulties. I note that a significant portion of defendant's additional claim seeks security against a cause of action sounding in indemnity. This ground, to say the least, is not highly regarded in the courts of the United States, *see Mitsui Steamship Co. Ltd.* v. *Jarka Corp.,* 218 F.Supp. 424 (E.D. Pa. 1964).

For the reasons set forth above, defendant is ordered to forthwith release its present attachment of the Steel Transporter. In the event this does not occur, application may be made to the Court on telephonic notice for consideration of alternative relief.

So ordered.

Dated: June 7, 1984
New York, New York

United States District Judge

Memorandum Order Endorsed by Owen, U.S.D.J.

Memorandum

I decline to stay my order of June 7, 1984 or to entertain consideration based on the post-order submissions. It is the Court's feeling that the vessel should be about its business and not attached in some foreign port under the circumstances of this case, and every day is a loss to the plaintiff.

So ordered

R. Owen

U.S.D.J.
6/14/84